(6)

Supreme Court, U.S.
FILED
SEP 1 8 2003
OFFICE OF THE CLERK

No. 02-1758

In the

Supreme Court of the United States

ASHLEY CREEK PHOSPHATE CO.
&
STATE OF UTAH

Petitioners,

v.

CHEVRON USA, INC. et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

E. Craig Smay
Counsel of Record
c/o E. Craig Smay, P.C.
174 E. South Temple
Salt Lake City, UT 84111
(801) 539-8515
Attorney for Petitioner.

13 pp

TABLE OF CONTENTS

Table of Contents i

Table of Cited Authorities ii

Introduction 1

Preparation 3

Property 7

Conclusions 10

TABLE OF CITED AUTHORITIES

Cable Holdings of Georgia v. Home Video, Inc., 825 F.2d 1559, 1561 (11 Cir. 1987) **6**

Curtis v. Campbell-Taggert Inc., 687 F.2d 336 (10 Cir. 1982), cert. den. 459 U.S. 1090 (1982). . . **6**

Gas Utilities Co. Of Ala., Inc. v. So. Natural Gas Co., 825 F.Supp. 1551 (N.D. Ala. 1992) **5, 6**

Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C.Cir. 1977), cert. Den. 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978). **9**

ICC and STB Decisions App. 8, n. 5. . . **4**

Jayco Systems, Inc. v. Savin Bus. Mach. Corp., 777 F.2d 306, 314-315 (5 Cir. 1985) **6**

North Texas Producers Ass'n v. Young, 308 F.2d 235, 243 (5 Cir. 1962). **9**

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) . **8**

Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566, 1572 (11 Cir. 1991). **5**

Waldron v. British Petroleum Co., Inc., 231 F.Supp. 72 (S.D. N.Y. 1964) **8, 9**

INTRODUCTION. Defendants' Briefs in Opposition try to show that the Court of Appeals has applied an established rule that a prospective business, to have antitrust standing, must show "intent and preparation to enter", and a "futility exception" to that rule. Also, the Court properly treated plaintiff's leaseholds as personalty used in a prospective business. This raises no issues worthy of certiorari. In fact, by holding that a court may ignore the nature of the violation as a barrier to entry (by ignoring binding agency rulings) in applying the "preparation" rule, and by requiring "preparations" *after* erection of barriers to entry, the Court of Appeals has inflated the "intent and preparation" rule, and eliminated any "futility exception". It mistook the injury alleged and the property injured, imposing a rule that narrows the scope of "property" under Clayton Act §4.

Defendants attempt to inject a factual basis for the ruling not adopted by the District Court below.[1] Neither

---

[1] The SF Defendants insert a list of "undisputed facts" submitted with their Motion for Summary Judgment, which plaintiff did not then deny. Brief 5-7. However, the Motion was advanced to avoid expert studies to be filed on the discovery schedule. The "undisputed facts" numbered 21, 32, 37, and 41, true at the date of the Motion, were rendered false by the filing of expert studies during the pendency of the Motion. This explains the District Court's treatment of these alleged facts.

"Undisputed fact" number 47 contained the correct tense of the verb because it referred to testimony in 1998 that Ashley "will not" go forward without divestiture while unreasonable tariffs prevailed. The District Court and the Court of Appeals converted this into "testimony that Ashley Creek *would not* move forward with its project", as if that had always been Ashley's position. App. at 18

Brief, however, disputes that:

1. The defect alleged in plaintiff's "preparations to enter"

(emphasis added). That violates the rule of construction on motions for summary judgment and is unsupported by the record.

The Chevron Defendants assert as "misstatements of fact" disagreements with interpretations of the evidence which Chevron failed to persuade the District Court to adopt. These assertions were resolved against Chevron on earlier motions, or were disputed below and not resolved by the District Court on Defendants' Motions for Summary Judgment. Such allegations are irrelevant on the present Petition. These include (Brief 4-15): (1) Trucking was cheaper than piping, but bad for public relations; (2) Trucking remained a viable alternative to piping; (3) Pipeline and drying costs prevented third party sales; (4) Western mines produce 6-12% of total phosphate concentrate and compete with Florida mines only in the West; (5) There are eight fertilizer producers in the West and Canada, all with ready supply of concentrate ; (6) Chevron diligently tried to sell concentrate, but its price was too high; (7) Cominco was the only third party purchaser of concentrate, and could produce for itself cheaper than Chevron; (8) There were no third party sales from a western mine; (9) There are other Western phosphate deposits available for development; (10) Chevron operated at a loss; (11) Plaintiff "sold" its leases to Mountain Fuel Supply Co., and Utah International; tried to "sell" to Chevron, Cominco, Agrium; (12) Plaintiff's leaseholds were unexplored before 1986; (13) Cominco told Chevron the going price was $24/ton for phosphate concentrate; (14) As late as 1991, there was no data for a "Type-2" feasibility study; (15) Chevron's production and transport costs exceeded what producers would pay for concentrate; (16) ACP never examined freight costs from Rock Springs; (17) ACP never investigated the alternative of trucking; (18) There is no evidence ACP could have sold phosphate concentrate; (19) The pipeline was not essential; (20) ACP justified non-development with litigation; (21) Mr. Archer said he never intended to develop without an interest in the pipeline; (22) The STB determined what "volume scenarios" to test and found the tariffs unreasonable at "some".

prior to the violations was failure to *prepare* a final feasibility study in order to pursue financing.
2. Preparation of such a study was impossible prior to publication of a tariff, as found by the ICC.
3. The District and Circuit Courts had before them an expert feasibility/damage study prepared during the litigation, showing satisfactory costs, a profitable market, and effects of the tariffs.
5. Unless altered by "retroactive reasonableness", the STB Decision found all of the applicable tariffs unreasonable at all shipping volumes indicated by the parties.
6. Unreasonable tariffs discriminated in favor of defendants, and against plaintiff.
7. A right of access through the federal pipeline right-of-way was appurtenant to plaintiff's leaseholds from the State of Utah, implemented by the right of common carriage.[2]

"PREPARATION". The issue on defendants' Motions for Summary Judgment was not whether plaintiff was "prepared to enter business" insofar as a market existed in which it could profitably sell. The issue posed was whether, *prior to the violation*, plaintiff *prepared a final feasibility study* and acted thereon. The *acts* of preparing such a study and pursuing financing were described as "preparations to enter".

It was pointed out that the ICC settled this issue by holding that refusal of a reasonable tariff prevented

---

[2] The specific claim of deprivation of a right of access was raised repeatedly in both Courts, Chevron notwithstanding.

formulation of any useful plan to enter. The STB determined that the tariffs subsequently published had not been reasonable. *Preparation* of a final feasibility study *prior* to publication of a tariff was impossible. *Preparation following* publication was futile: the study could not be accurate incorporating discriminatory rates, and such rates prevented competition. Meanwhile, the *facts* regarding costs and markets at times of the violations were shown by an expert feasibility/damage study delivered on the District Court's schedule. *Conceding* that a final feasibility study *prior* to the publication of a tariff had not been possible left the issue whether preparing one *after* the publication was futile.

It was then held, without evidence, that publication of unreasonable tariffs did not "prevent" determining what customers would pay[3], or production and other costs, to determine if plaintiff could afford any tariff. Absent determining these matters, it was not known whether plaintiff would have failed regardless of the tariffs. App. 17-18. Until a study was done, it was held, plaintiff lacked a "business" to injure: the court need not consider whether defendants' behavior was a violation or consider the ICC

---

[3] The Chevron defendants confess this was false: "[Plaintiff] never obtained any purchase commitments or sales contracts, which is the only way to establish a price . . . (due to a lack of a public or 'spot' . . . market)". Brief at 11. Without a tariff, plaintiff could not formulate a price to submit to customers; without a reasonable tariff, plaintiff could not calculate a competitive price. Thus, it could not make contracts, and no other means of discerning current prices was available.

and STB Decisions defining whether the refusal of reasonable tariffs erected "barriers to entry". App. 8, n. 5.

This lead to the rejection of "an assertion that a proposed market entrant need take no further preparatory steps . . . after an asserted violation of the antitrust laws by the party in control of an essential facility", based upon *Gas Utilities Co. Of Ala., Inc. v. So. Natural Gas Co.*, 825 F.Supp. 1551 (N.D. Ala. 1992), "holding that plaintiff could not use defendant's denial of access to a pipeline to create an inference of antitrust injury to business or property". App. 24. Even after denial of an essential facility, plaintiff was required to complete "basic preparatory steps". *Gas Utilities*, however, specifically holds that the pipeline "tap" sought there was *not* an essential facility because alternative access was available. 825 F.Supp. at 1574. The rule of *Gas Utilities* is that denial of access to a pipeline does not infer injury to business or property, where such access is not an essential facility. This is consistent with the rule of the Court of Appeals of that Circuit that where defendant creates a "barrier to entry", plaintiff's "reasonable attempt to enter the market" "is sufficient to establish an injury in fact". *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d

1566,1572 (11 Cir. 1991).[4]

The contrary Tenth Circuit rule is unprecedented: the court will ignore any violation that occurs before a final feasibility study, notwithstanding what the study would show, or whether, by creating a barrier to entry, the violation rendered such a study futile as a "preparation to enter". It might be appropriate to require "preparations" *after* an alleged violation, where the violation is not by definition a "barrier to entry" (*Cable Holdings of Georgia v. Home Video, Inc.*, 825 F.2d 1559, 1561 (11 Cir. 1987)), or where the court rejects a claim that the violation is a "barrier to entry" (*Gas Utilities*, supra). It might be appropriate *despite* a violation alleged to be a "barrier to entry", where plaintiff demonstrates first that it could or would not have entered if no barrier had been erected. *Jayco Systems, Inc. v. Savin Bus. Mach. Corp.*, 777 F.2d 306, 314-315 (5 Cir. 1985); *Curtis v. Campbell-Taggert Inc.*, 687 F.2d 336 (10 Cir. 1982), cert. den. 459 U.S. 1090 (1982). No case has held, however, that the court may ignore agency rulings defining the violation as a barrier to entry, in determining whether acts that could only be completed after the violation were required "preparations

---

[4] The Court of Appeals is wrong that the plaintiff in *Thompson* "was already an established realtor in the market served by the defendant board of realtors and multiple listing service." Plaintiff had a license and an office in the geographical area served by defendants; he was not in the product market, multi-list services, because defendants withheld the product. 934 F.2d at 1570, 1572.

to enter".[5]

As Chevron asserts, the Tenth Circuit "futility exception" only applies "*if* the plaintiff otherwise shows demonstrated preparation to compete". Brief at 24. An exception that only applies after the rule is satisfied is no exception. It is a rule that "preparations to enter" must be completed after the erection of barriers to entry.[6]

Where plaintiff has the wherewithal and has made a substantial effort to enter, the imposition of a barrier to entry constitutes injury in fact. This does not violate the rule that a violation without an injury is not actionable; it recognizes that the barrier itself is an injury where plaintiff has wherewithal and has done all "preparation" that makes sense. It is the natural result of the rule that it is as illegal to keep competitors out of business as it is to drive them out. It prevents defendants taking advantage of standing by preemptive denial of required access to common carriers.

"PROPERTY". The Court of Appeals treats the word "property" as it appears in §4 of the Clayton Act as a reference to common personalty, which can only be

---

[5] Mr. Aro's 1993 notes indicating frustration at the futility of further exploration while resources were consumed in legal efforts to correct unreasonable tariffs, do not detract from assertion of the futility exception here.

[6] The Court of Appeals is wrong again that any of the cases citing a futility exception to the preparation rule requires that the rule be satisfied before the exception applies.

"injured" in a business venture. ". . . when the plaintiff's claimed injury to property flows from its claim that it would have used the property as part of an anticipated business venture", the Court of Appeals considers plaintiff's "lack of preparedness to enter" business in determining whether an injury to property is shown. App. at 28. In context, this means that where lack of a final feasibility study at the time of the violation results in a decision that there then existed no business to injure, plaintiff may not support a claim of injury to existing *property* with a later study showing all an earlier feasibility could show.

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) establishes that deprivation of property is injury to property under Clayton Act §4. Prevention of development of mineral property by deprivation of a right of access to market through the only property providing such access, is injury to the mineral property, causing damages of lost profits of the development. The ICC and STB Decisions establish that defendants thus deprived plaintiff of a right of access through defendants' pipeline.[7] Such injury bears no resemblance to "injury" to vehicles and machines resulting from suppression of a business in which they might have been used. Common personalty is

---

[7] *Waldron v. British Petroleum Co., Inc.*, 231 F.Supp. 72 (S.D. N.Y. 1964) indicates that interference with the attempt to exercise a right part of the group constituting a contract, is sufficient for injury to plaintiff's property in the contract, without attempted sale of the contract. 231 F.Supp. at 87.

not a bundle of rights adopted to a discrete purpose, and which can be diminished by interference with one of the rights of which it is composed. Absent breakage or loss of title, it retains its use and value, notwithstanding a particular venture is thwarted. The ruling that mere possession of property does not confer standing ignores both the ICC and STB Decisions, and the fact that plaintiff's leaseholds are both realty and contracts. The claim goes beyond mere possession, and alleges interference with a right of property diminishing the use and value of the property.

With respect to realty and contracts, the source of known claims to date[8], the Court of Appeals' rule is wrong, and particularly as it disregards binding agency rulings establishing interference with rights part of the property. Where property adopted to commercial uses consists of a group of rights - such as commercial real estate, or contracts - interference with such a right may stifle a potential competitor. If the owner is then attempting to use such right, preventing such use is a deprivation of property. Any difficulty in proving lost profits goes to the question of damages, and is not affected by when a damage study is prepared. Failure to recognize such a deprivation as an injury to property, whether or not an injury to business, improperly restricts the scope of Clayton Act §4.

---

[8] See, *e.g.*, *North Texas Producers Ass'n v. Young*, 308 F.2d 235, 243 (5 Cir. 1962); *Waldron v. British Petroleum, supra*, 231 F.Supp. at 86; *Hecht v. Pro-Football*, 570 F.2d 982, 993 (D.C. Cir. 1977)..

CONCLUSIONS. The Court of Appeals makes a Catch-22 of the "intent and preparation" test of standing, and its "futility exception": unless "preparations" impossible prior to the violation alleged are performed before the violation, plaintiff may not show that the violation rendered such "preparations" futile. It establishes a precedent that licensees of the public domain to operate a system - for transport, or communication, or transmission - made common to protect competition, may, by preemptive violation of applicable regulations, suppress competition.

The ruling represents a quantum leap in the erection of barriers to enforcement of antitrust laws. It authorizes misuse of the public domain for private monopoly. It is properly the subject of a writ of certiorari.

DATED this 8th day of September, 2003.

E. Craig Smay
Counsel of Record
E. CRAIG SMAY, P.C.
174 E. South Temple
Salt Lake City, UT 84111-1102
(801) 539-8515